

FILED
SUPREME COURT
STATE OF WASHINGTON
9/27/2019 8:44 AM
BY SUSAN L. CARLSON
CLERK

FILED
SUPREME COURT
STATE OF WASHINGTON
10/7/2019
BY SUSAN L. CARLSON
CLERK

NO. 96766-1

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

COLLEEN DAVISON, legal guardian for K.B., a minor, on behalf of
themselves and others similarly situated, and GARY MURRELL,

Respondents,

v.

STATE OF WASHINGTON and WASHINGTON STATE OFFICE
OF PUBLIC DEFENSE,

Petitioners.

BRIEF OF *AMICUS CURIAE*,
THE NATIONAL JUVENILE DEFENDER CENTER

Law Office of Neil Fox, PLLC
Neil M. Fox, WSBA # 15277
2125 Western Ave. Ste. 330
Seattle, WA 98121
206-728-5440
nf@neilfoxlaw.com
Cooperating Attorney for NJDC

Harris, Wiltshire & Grannis LLP
Roy L. Austin
1919 M Street NW, Ste. 800
Washington, DC 20036
202-730-1300
raustin@hwglaw.com
Attorney for Amicus Curiae NJDC

**National Juvenile Defender
Center (NJDC)**
Mary Ann Scali
1350 Connecticut Ave. NW,
Ste. 304
Washington, DC 20036
202-452-0010
mscali@njdc.info
*Attorney for Amicus Curiae
NJDC*

TABLE OF CONTENTS

Introduction.....	1
Identity and Interest of Amicus.....	1
Statement of the Case.....	1
Argument	1
I. Fifty-Two Years After Gault, the “Guiding Hand of Counsel” Remains Beyond Reach for Many Youth in Juvenile Delinquency Proceedings	1
A. Youth Nationwide Are Often Denied Effective Counsel, Receiving Counsel in Name Only.....	1
B. County-Based Juvenile Systems Create Some of the Worst Problems for Juvenile Representation, Leading to an Untenable Justice by Geography	4
II. There is Nothing Just About a Justice System that Provides Counsel in Name Only to Juvenile Defendants	9
A. States Defy Fundamental Principles of Due Process When They Deny Young People Effective Counsel	9
B. Due to Young People’s Innate Vulnerability, the Need for Effective Counsel is Particularly Acute Among Youth in Conflict with the Law	12
C. Fundamental Fairness Requires the Examination of Due Process through a Youth-Focused Lens.....	14
D. States’ Failure to Provide Effective Counsel for Youth Disproportionately Harms Young People of Color and Other Disadvantaged Communities	17
V. Conclusion	19

TABLE OF AUTHORITIES

CASES

<i>Avery v. Alabama</i> , 308 U.S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1940)	10
<i>Gideon v. Wainwright</i> , 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).....	9
<i>Graham v. Florida</i> , 560 U.S. 48, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).....	12, 15
<i>In re Gault</i> , 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967)	1, 3, 4, 9, 10, 11, 14
<i>J.D.B. v. North Carolina</i> , 564 U.S. 261, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011).....	12, 14, 15
<i>Kent v. United States</i> , 383 U.S. 541, 86 S.Ct. 1045 (1966).....	8
<i>McKeiver v. Pennsylvania</i> , 403 U.S. 528, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971)	14
<i>Miller v. Alabama</i> , 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012).....	14, 15
<i>Reed v. Duter</i> , 416 F.2d 744 (7th Cir. 1969)	16
<i>Roper v. Simmons</i> , 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005).....	12, 14, 15
<i>Strickland v. Washington</i> , 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).....	10
<i>United States v. Carolene Products Co.</i> , 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed.2d 1234 (1938).....	19

<i>United States v. Cronic</i> , 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984).....	10, 18
<i>United States v. M.I.M.</i> , 932 F.2d 1016 (1st Cir. 1991).....	16
OTHER	
AMERICAN BAR ASSOCIATION & NATIONAL JUVENILE DEFENDER CENTER, GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2001), https://njdc.info/wp-content/uploads/2013/10/Georgia-Assessment-Report.pdf	4, 5, 6, 19
AMERICAN BAR ASSOCIATION & NATIONAL JUVENILE DEFENDER CENTER, NORTH CAROLINA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003), https://njdc.info/wp-content/uploads/2013/09/Final-North-Carolina-Assessment-Report.pdf	6, 7, 8
AMERICAN BAR ASSOCIATION & NATIONAL JUVENILE DEFENDER CENTER, PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2003), https://njdc.info/wp-content/uploads/2013/11/Final-Pennsylvania-Assessment-Report.pdf	5, 7, 8
AMERICAN BAR ASSOCIATION & NATIONAL JUVENILE DEFENDER CENTER, WASHINGTON: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE OFFENDER MATTERS (2003), https://njdc.info/wp-content/uploads/2013/11/Final-Washington-State-Assessment-Report.pdf	4, 8
ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH (2013)	3
Barbara A. Fedders, <i>Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation</i> , 14 LEWIS & CLARK L. REV. 771 (2010).....	1, 2, 4

CENTER FOR AMERICAN PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN JUVENILE AND CRIMINAL SYSTEMS FAIL LGBTQ YOUTH (2016), http://lgbtmap.org/file/lgbt-criminal-justice-youth.pdf	17
CORA ROY-STEVENSON, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPARTMENT OF JUSTICE, OVERCOMING BARRIERS TO SCHOOL REENTRY (2004)	3
Donna M. Bishop & Hillary B. Farber, <i>Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by In Re Gault</i> , 60 RUTGERS L. REV. 125 (2007).	15
Elizabeth P. Shulman & Elizabeth Cauffman, <i>Reward-Biased Risk Appraisal and Its Relation to Juvenile Versus Adult Crime</i> , 37 LAW & HUM. BEHAV. 412 (2013).	13
INSTITUTE FOR JUDICIAL ADMINISTRATION. & AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH (Robert E. Shepherd, Jr., ed. 1996), https://www.ncjrs.gov/pdffiles1/ojjdp/166773.pdf	3, 4
Jason Chein et al., <i>Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry</i> , 14 DEV. SCI. (2011)	13
Jerry Kang et. al., <i>Implicit Bias in the Courtroom</i> , 59 UCLA L.R. 1124 (2012)	18
Joshua Rovner, THE SENTENCING PROJECT, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM (2014).	17
Joshua Rovner, THE SENTENCING PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS, (2016).	17
<i>Jurisdictional Boundaries</i> , JUVENILE JUSTICE, GEOGRAPHY, POLICY, PRACTICE & STATISTICS, http://www.jjgps.org/jurisdictional-boundaries#compare-transfer-provisions?age=1&action=2&year=2016&state=52&offense=-1 (last visited Sept. 26, 2019).	3

Kristin Henning, <i>Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child's Counsel in Delinquency Cases</i> , 81 NOTRE DAME L.R. 245 (2005).	18
Laurence Steinberg et al., <i>Age Differences in Sensation-Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model</i> , 44 DEV. PSYCHOL. 1764 (2008).	13
Laurence Steinberg et al., <i>Age Differences in Future Orientation and Delay Discounting</i> , 80 CHILD DEV. 28 (2009).	13, 19
LAURENCE STEINBERG, <i>AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE</i> (2014).	12
Lia O'Brien et al., <i>Adolescents Prefer More Immediate Rewards When in the Presence of their Peers</i> , 21 J. RES. ADOLESCENCE 747 (2011).	13
Margo Gardner & Laurence Steinberg, <i>Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study</i> , 41 DEV. PSYCHOL. 625 (2005).	13
Marsha Levick & Neha Desai, <i>Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at all Stages of the Juvenile Court Process</i> , 60 RUTGERS L REV. 175 (2007).	16
Michael Dreyfuss et al., <i>Teens Impulsively React rather than Retreat from Threat</i> , 36 DEV. NEUROSCIENCE 220 (2014).	13
Michele LaVigne & Gregory J. Van Rybroek, <i>Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters</i> , 15 U.C. DAVIS J. JUV. L. & POL'Y 37 (2011).	18
NATIONAL JUVENILE DEFENDER CENTER, <i>ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES' FAILURE TO PROTECT CHILDREN'S RIGHT TO COUNSEL</i> (2017), http://njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf	2
NATIONAL JUVENILE DEFENDER CENTER, <i>ARIZONA: BRINGING GAULT HOME: AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE</i>	

DEFENSE COUNSEL (2018), https://njdc.info/wp-content/uploads/2018/09/Arizona-Assessment-NJDC.pdf	5, 6
NATIONAL JUVENILE DEFENDER CENTER, FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2006), https://njdc.info/wp-content/uploads/2013/11/Florida-Assessment1.pdf	5, 7
NATIONAL JUVENILE DEFENDER CENTER, HAVE A JUVENILE RECORD? PLAN FOR YOUR FUTURE! WASHINGTON (2017), https://njdc.info/wp-content/uploads/2018/04/WA-CC-Booklet-Final-2.pdf	3
NATIONAL JUVENILE DEFENDER CENTER, ILLINOIS: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2007), https://njdc.info/wp-content/uploads/2013/11/Illinois_Juvenile_Defense_Assessment-Report_FINAL.pdf	5
NATIONAL JUVENILE DEFENDER CENTER, INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS (2006), https://njdc.info/wp-content/uploads/2013/11/Final-Indiana-Assessment.pdf	7
NATIONAL JUVENILE DEFENDER CENTER, MISSISSIPPI: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN YOUTH COURT PROCEEDINGS (2007), https://njdc.info/wp-content/uploads/2013/11/Final-Mississippi-Assessment-Report.pdf	5, 7
NATIONAL JUVENILE DEFENSE STANDARDS (NATIONAL JUVENILE DEFENDER CENTER 2012)	4
<i>Resources for Public Defense Representation of Juveniles Facing Criminal Charges: Collateral Consequences</i> , WASHINGTON STATE OFFICE OF PUBLIC DEFENSE, https://opd.wa.gov/index.php/program/trial-defense/12-pd/184-juvenile-offender-cases (last visited Sept. 26, 2019)	3
Robert E. Shepherd, Jr., <i>Collateral Consequences of Juvenile Proceedings: Part II</i> , 15 CRIM. JUST. 41 (2000)	16
Sarah E. Valentine, <i>Traditional Advocacy for Nontraditional Youth: Rethinking Best Interest for the Queer Child</i> , 2008 MICH. ST. L.R. 1053, 1073 (2008)	18

Shaena M. Fazal, Youth Advocate Programs Policy & Advocacy Center, <i>Safely Home: Reducing Youth Incarceration and Achieving Positive Youth Outcomes for High and Complex Need Youth Through Effective Community-Based Programs</i> (2014), http://www.yapinc.org/Portals/0/Documents/Safely%20Home%20Preview/safelyhome.pdf	3
Statement of Interest of the United States, <i>N.P. et al. v. State</i> , No. 2014- CV-241025 (Ga. Super. Ct. 2015).	1, 9, 10, 11
SUE BURRELL & LOREN WARBOYS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, SPECIAL EDUCATION AND THE JUVENILE JUSTICE SYSTEM (2000), https://www.ncjrs.gov/pdffiles1/ojjdp/179359.pdf	17
Tamar R. Birckhead, <i>The Racialization of Juvenile Justice and the Role of the Defense Attorney</i> , 58 B. C. L. REV. 379 (2017).....	17, 18
Thomas Grisso et al., <i>Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants</i> , 27 LAW & HUM. BEHAV. 333 (2003).	19
Wallace J. Mlyniec, <i>In re Gault at 40: the Right to Counsel in Juvenile Court – A Promise Unfulfilled</i> , 44 CRIM. L. BULL. 5 (May-June 2008).	11

INTRODUCTION

Over a half century ago, the U.S. Supreme Court affirmed that young people have a constitutional right to counsel in delinquency proceedings.¹ The Court declared that a child “requires the guiding hand of counsel at every step in the proceedings against him.”² Unfortunately, this guiding hand remains beyond reach for most young people in delinquency courts today. Too often counsel is in name only,³ as demonstrated by the failures outlined in Respondent’s opening brief.

IDENTITY AND INTEREST OF AMICUS

The identity and interest of *amici curiae* are set forth in the accompanying Motion for Leave to File an *Amicus Curiae* Brief.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case as set forth by Respondents.

ARGUMENT

I. Fifty-Two Years After *Gault*, the “Guiding Hand of Counsel” Remains Beyond Reach for Many Youth in Juvenile Delinquency Proceedings

A. Youth Nationwide Are Often Denied Effective Counsel, Receiving Counsel in Name Only

¹ *In re Gault*, 387 U.S. 1, 41, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

² *Id.* at 36.

³ See Statement of Interest of the United States, *N.P. et al. v. State*, No. 2014-CV-241025, 6 (Ga. Super. Ct. 2015) [hereinafter U.S. Statement of Interest]; Barbara A. Fedders, *Losing Hold of the Guiding Hand: Ineffective Assistance of Counsel in Juvenile Delinquency Representation*, 14 LEWIS & CLARK L. REV. 771, 791-800 (2010).

Despite the fact that there are many talented juvenile defense attorneys who are dedicated to the specialized defense of young people, juvenile defense systems across the country are under-valued, under-resourced, and lack the specialized training opportunities necessary for providing adequate representation to young people.⁴

Juvenile defenders are regularly inundated with high caseloads, at even greater rates than adult public defenders.⁵ Their offices are frequently insufficiently funded and provide minimal training.⁶ Additionally, “[j]uvenile courts are often the first stop for recent law graduates, who, after gaining experience, are typically rotated into criminal court to represent adults.”⁷ Juvenile courts “are also often havens for defenders looking for less scrutiny from their professional peers or their superiors.”⁸

Cultural assumptions about the juvenile system make matters worse. Many people falsely believe that the consequences of a juvenile proceeding are not serious or are short-lasting and, thus, they do not require an attorney’s best efforts.⁹ This belief comes despite evidence that

⁴ See NATIONAL JUVENILE DEFENDER CENTER, ACCESS DENIED: A NATIONAL SNAPSHOT OF STATES’ FAILURE TO PROTECT CHILDREN’S RIGHT TO COUNSEL 4 (2017), http://njdc.info/wp-content/uploads/2017/05/Snapshot-Final_single-4.pdf; Fedders, *supra* note 3, at 791 (“The reality is that in today’s juvenile courts, assigning an attorney to a case does not guarantee that a child’s due process rights will be honored.”).

⁵ Fedders, *supra* note 3, at 798-99.

⁶ *Id.*

⁷ *Id.* at 799.

⁸ *Id.*

⁹ See *id.*

involvement in the juvenile system has detrimental long-term effects.¹⁰ The reality is that youth in every jurisdiction face increasing numbers of collateral consequences¹¹ and may be subject to some form of jurisdictional transfer or prosecution in adult court.¹² Yet, regardless of how one feels about the severity of juvenile court involvement, the U.S. Supreme Court’s holding in *Gault* recognized that “[a] proceeding where the issue is whether the child will be found to be ‘delinquent’ and subjected to the loss of his liberty for years *is comparable in seriousness to a felony prosecution.*”¹³

Despite the existence of National Juvenile Defense Standards¹⁴ and state-based codes of ethics, assessments of national and state juvenile

¹⁰ See ALLEN J. BECK ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEPARTMENT OF JUSTICE, SEXUAL VICTIMIZATION IN JUVENILE FACILITIES REPORTED BY YOUTH (2013); Shaena M. Fazal, Youth Advocate Programs Policy & Advocacy Center, *Safely Home: Reducing Youth Incarceration and Achieving Positive Youth Outcomes for High and Complex Need Youth Through Effective Community-Based Programs* (2014) <http://www.yapinc.org/Portals/0/Documents/Safely%20Home%20Preview/safelyhome.pdf>. See also CORA ROY-STEVENSON, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, U.S. DEPARTMENT OF JUSTICE, OVERCOMING BARRIERS TO SCHOOL REENTRY (2004).

¹¹ See NATIONAL JUVENILE DEFENDER CENTER, HAVE A JUVENILE RECORD? PLAN FOR YOUR FUTURE! WASHINGTON (2017), <https://njdc.info/wp-content/uploads/2018/04/WACC-Booklet-Final-2.pdf>; *Resources for Public Defense Representation of Juveniles Facing Criminal Charges: Collateral Consequences*, WASHINGTON STATE OFFICE OF PUBLIC DEFENSE, <https://opd.wa.gov/index.php/program/trial-defense/12-pd/184-juvenile-offender-cases> (last visited Sept. 26, 2019).

¹² See *Jurisdictional Boundaries*, JUVENILE JUSTICE, GEOGRAPHY, POLICY, PRACTICE & STATISTICS, <http://www.jjgps.org/jurisdictional-boundaries#compare-transfer-provisions?age=-1&action=2&year=2016&state=52&offense=-1> (last visited Sept. 26, 2019).

¹³ *In re Gault*, 387 U.S. at 36 (emphasis added).

¹⁴ See, e.g., INSTITUTE FOR JUDICIAL ADMINISTRATION & AMERICAN BAR ASSOCIATION, JUVENILE JUSTICE STANDARDS ANNOTATED: A BALANCED APPROACH (Robert E.

defense systems show that these guidelines are regularly ignored, or disregarded, with juvenile defense attorneys routinely failing to interview witnesses, visit crime scenes, file pre-trial motions, or prepare for dispositional hearings.¹⁵ Washington is not immune to these failures.¹⁶

B. County-Based Juvenile Systems Create Some of the Worst Problems for Juvenile Representation, Leading to an Untenable Justice by Geography

While states everywhere are struggling to meet the constitutional mandates of *Gault*, states with county-based systems may be especially lacking. The absence of centralized juvenile defense leadership and oversight structures with mandates for basic levels of performance, training, and data collection leaves counties without guidance on how to establish effective systems of juvenile defense. Numerous state assessments show that these fractured systems create wide disparities in the quality of counsel that youth receive.¹⁷ Relatedly, these systems suffer

Shepherd, Jr., ed. 1996); *see also* NATIONAL JUVENILE DEFENSE STANDARDS (NATIONAL JUVENILE DEFENDER CENTER 2012).

¹⁵ Fedders, *supra* note 3, at 792-793.

¹⁶ *See generally*, AMERICAN BAR ASSOCIATION & NATIONAL JUVENILE DEFENDER CENTER, WASHINGTON: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN JUVENILE OFFENDER MATTERS (2003) [hereinafter NJDC Washington Assessment], <https://njdc.info/wp-content/uploads/2013/11/Final-Washington-State-Assessment-Report.pdf>.

¹⁷ *See, e.g.*, AMERICAN BAR ASSOCIATION & NATIONAL JUVENILE DEFENDER CENTER, GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 2 (2001), <https://njdc.info/wp-content/uploads/2013/10/Georgia-Assessment-Report.pdf> [hereinafter NJDC Georgia Assessment] (“The fragmented system of indigent defense results in *uneven and inconsistent representation* of children across the various counties” (emphasis added)).

from a lack of defined standards,¹⁸ tend to leave juvenile defenders severely under-resourced,¹⁹ and permit egregious forms of ineffective counsel to slip by.²⁰

For example, a 2018 assessment of Arizona’s county-based system found “pervasive disparities as to how and when children access counsel and the quality of representation youth receive when facing delinquency proceedings.”²¹ Among those disparities, many attorneys did not “engage in the type of legal advocacy envisioned by the United States or Arizona

¹⁸ See, e.g., AMERICAN BAR ASSOCIATION & NATIONAL JUVENILE DEFENDER CENTER, PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 32 (2003), <https://njdc.info/wp-content/uploads/2013/11/Final-Pennsylvania-Assessment-Report.pdf> [hereinafter NJDC Pennsylvania Assessment] (“Our [research finds] an *absence of uniformity in standards and quality of representation* among the juvenile defense systems across counties. Investigators who visited more than one county often remarked on the *varied quality of juvenile defender practices*.” (emphasis added)).

¹⁹ See, e.g., NATIONAL JUVENILE DEFENDER CENTER, MISSISSIPPI: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN YOUTH COURT PROCEEDINGS 30 (2007), <https://njdc.info/wp-content/uploads/2013/11/Final-Mississippi-Assessment-Report.pdf> [hereinafter NJDC Mississippi Assessment]; NATIONAL JUVENILE DEFENDER CENTER, FLORIDA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 14-15 (2006), <https://njdc.info/wp-content/uploads/2013/11/Florida-Assessment1.pdf> [hereinafter NJDC Florida Assessment]; NJDC Georgia Assessment, *supra* note 17, at 2.

²⁰ See, e.g., NATIONAL JUVENILE DEFENDER CENTER, ARIZONA: BRINGING GAULT HOME: AN ASSESSMENT OF ACCESS TO AND QUALITY OF JUVENILE DEFENSE COUNSEL 28 (2018), <https://njdc.info/wp-content/uploads/2018/09/Arizona-Assessment-NJDC.pdf> [hereinafter NJDC Arizona Assessment] (“Many defenders reported . . . they only meet with the child right before the hearing One defender told investigators: ‘I am available if kids call, but they don’t call.’”); NATIONAL JUVENILE DEFENDER CENTER, ILLINOIS: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 51 (2007), https://njdc.info/wp-content/uploads/2013/11/Illinois_Juvenile_Defense_Assessment-t_Report_FINAL.pdf (“One attorney . . . *had visited only one client in detention in 5 ½ years*. She explained that she did not talk to her clients on the phone, because she worried that the lines were not secure; *consequently all of her client contact was in the hallway before court hearings*.” (emphasis added)).

²¹ NJDC Arizona Assessment, *supra* note 20, at 23.

Constitutions, the Arizona Juvenile Code, or ethical codes of professional conduct.”²² The report concluded that many of the system’s shortcomings “[could] be attributed to a lack of—and addressed by—centralized oversight and leadership.”²³

A 2001 assessment in Georgia found similar problems. There, of the state’s 159 counties, “even [those] within the same judicial circuit [did] not share the responsibility for developing and administering the system of representing indigent children.”²⁴ And while the state provided limited funding, counties chose whether to apply and had no oversight for their spending.²⁵ “All of these factors combine[d] to create a fragmented system and 159 different ways of representing children.”²⁶

County-based systems often lack agreed-upon standards and training for juvenile defenders, thus widening disparities in quality. A report on North Carolina’s system concluded that “[t]he uneven . . . representation observed [was] attributable to a lack of uniform standards, inadequate training and . . . a misapprehension of the role of defense counsel.”²⁷ Indeed, the report noted, “[t]he delivery of indigent defense

²² *Id.*

²³ *Id.* at 62.

²⁴ NJDC Georgia Assessment, *supra* note 17, at 17.

²⁵ *Id.*

²⁶ *Id.*

²⁷ AMERICAN BAR ASSOCIATION & NATIONAL JUVENILE DEFENDER CENTER, NORTH CAROLINA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 2 (2003), <https://njdc.info/wp->

services without a system of accountability or practice standards can have a devastating impact on the quality of representation.”²⁸

Disparities in funding between counties worsen problems. In Mississippi, juvenile defenders were “unable to provide adequate representation because the juvenile indigent defense system lack[ed] statewide uniformity and necessary resources.”²⁹ Consequently, “[c]ourt-appointed defenders struggle[d] with high caseloads and [did] not receive adequate compensation for their critically important work.”³⁰

Many alarming examples of inadequate counsel also slip by in these patchwork systems. In Indiana, “in one county, it was rumored that one of the public defenders kept his voicemail full, so he could not receive calls from his clients.”³¹ In Pennsylvania, many youth were unable to reach their assigned attorneys, so they consult detention staff out of desperation, believing incorrectly these communications are confidential.³²

content/uploads/2013/09/Final-North-Carolina-Assessment-Report.pdf [hereinafter NJDC North Carolina Assessment].

²⁸ *Id.*; see also NJDC Pennsylvania Assessment, *supra* note 18, at 35.

²⁹ NJDC Mississippi Assessment, *supra* note 19, at 31.

³⁰ *Id.*; see also NJDC Florida Assessment *supra* note 19, at 15 (“[T]he resources provided for juvenile indigent defense can and do vary greatly from one judicial circuit to another. This can have a significant impact on youth’s access to competent counsel throughout the duration of the juvenile court process.”).

³¹ NATIONAL JUVENILE DEFENDER CENTER, INDIANA: AN ASSESSMENT OF ACCESS TO COUNSEL & QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 32 (2006), <https://njdc.info/wp-content/uploads/2013/11/Final-Indiana-Assessment.pdf>.

³² NJDC Pennsylvania Assessment, *supra* note 15, at 42.

As a result of this fragmentation, young people facing prosecution in county-based delinquency systems are subject to justice by geography. The North Carolina report found a child's outcome "dependent upon the county in which she reside[d] and the individual appointed to represent her."³³ Similarly, a 2003 assessment of Washington's system found the quality of a child's attorney "depend[ed] significantly on where he or she live[d]."³⁴

Although every state has made progress on improving its system of juvenile defense after NJDC assessed its access to and quality of juvenile defense counsel, the current situation in Grays Harbor County suggests there is much left to do to achieve a constitutionally-sound system for youth.

II. There is Nothing Just About a Justice System That Provides Counsel in Name Only to Juvenile Defendants

"The right to representation by counsel is not a formality. It is not a grudging gesture to a ritualistic requirement. It is of the essence of justice."³⁵

A. States Defy Fundamental Principles of Due Process When They Deny Young People Effective Counsel

³³ NJDC North Carolina Assessment *supra* note 28, at 2. See NJDC Pennsylvania Assessment, *supra* note 15, at 42 ("In some counties, juvenile defense attorneys have become so marginalized in the process they seemed to have no role at all. In contrast, many appointed attorneys and public defenders were observed providing competent, well-prepared representation.").

³⁴ NJDC Washington Assessment, *supra* note 16, at 45.

³⁵ *Kent v. United States*, 383 U.S. 541, 561, 86 S.Ct. 1045 (1966).

Due process is the cornerstone of any legal system. “[It] is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise.”³⁶ Indeed, “[p]rocedure is to law what ‘scientific method’ is to science.”³⁷

This cornerstone crumbles when those accused of breaking the law are denied counsel.³⁸ “[A]ny person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”³⁹ This is because people unfamiliar with the legal process cannot be expected to make their own case:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction

³⁶ *In re Gault* 387 U.S. at 20.

³⁷ *Id.* at 21 (citations omitted).

³⁸ See U.S. Statement of Interest at 7 (“The right to counsel is so fundamental to the operation of the criminal and juvenile justice systems that diminishment of that right erodes the principles of liberty and justice that underpin these proceedings.”)

³⁹ *Gideon v. Wainwright*, 372 U.S. 335, 344, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963).

because he does not know how to establish his innocence.⁴⁰

This principle extends to all accused, especially children:

The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child “requires the guiding hand of counsel at every step in the proceedings against him.”⁴¹

So too this cornerstone crumbles when counsel is in name only, which is why “the right to counsel is the right to the *effective assistance of counsel*.”⁴² To give due process any meaning, attorneys must subject the government’s case to the “crucible of meaningful adversarial testing.”⁴³ In short, “[t]hat a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough.”⁴⁴ As the U.S. Department of Justice has acknowledged, “children, like adults, are denied their right to

⁴⁰ *Id.* at 345 (internal citations omitted).

⁴¹ *In re Gault*, 387 U.S. at 36 (internal citations omitted) (emphasis added); *see also* U.S. Statement of Interest at 6 (“*Gault* stands for the proposition that children involved in the juvenile justice system are fully entitled to due process in their dealings with the court.”).

⁴² *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (internal citations omitted) (emphasis added).

⁴³ *United States v. Cronin*, 466 U.S. 648, 656, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984); *accord Strickland*, 466 U.S. at 685 (“An accused is entitled to be assisted by an attorney . . . who *plays the role necessary* to ensure that the trial is fair” (emphasis added)).

⁴⁴ *Strickland*, 466 U.S. at 685; *accord Avery v. Alabama*, 308 U.S. 444, 446, 60 S. Ct. 321, 84 L. Ed. 377 (1940) (“The Constitution’s guarantee of assistance of counsel cannot be satisfied by mere formal appointment.”).

counsel not only when an attorney is entirely absent, but also *when an attorney is made available in name only*.⁴⁵

Moreover, the representation of a young person requires skills beyond those necessary for defending an adult. Defenders of youth must have knowledge of the law and procedure at play in juvenile court, and the attorney must understand how the status of childhood implicates decisions both the youth and the court make.

Lawyers for children must be aware of their clients' individual and family histories, their schooling, developmental disabilities, mental and physical health, and the clients' status in their community in order to assess their capacities to proceed and to assist in their representation. Once those capacities are understood, the lawyer must vigorously defend the juvenile against the charges with that capacity in mind, and then prepare arguments to obtain rehabilitative treatment should the child be found guilty.⁴⁶

B. Due to Young People's Innate Vulnerability, the Need for Effective Counsel is Particularly Acute Among Youth in Conflict with the Law

"[A]s any parent knows and as . . . scientific and sociological studies tend to confirm," young people are less mature than adults and less

⁴⁵ See U.S. Statement of Interest at 7 (emphasis added).

⁴⁶ Wallace J. Mlyniec, *In re Gault at 40: the Right to Counsel in Juvenile Court – A Promise Unfulfilled*, 44 CRIM. L. BULL. 5, 4 (May-June 2008).

prepared to handle stressful situations.⁴⁷ “These [differences] often result in impetuous and ill-considered actions and decisions.”⁴⁸ Indeed, “events that ‘would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.’”⁴⁹ Although this conception of the child goes far back in Anglo-American law,⁵⁰ modern research continues to endorse this view, adding new insights.⁵¹ For example, science shows young people lack full developmental maturity even through their early- or mid-twenties.⁵²

The courts are simply recognizing what developmental science research is illuminating: youth think, comprehend, and make decisions differently from adults. Adolescents are more likely than adults to engage in riskier decision-making when with peers than when alone, largely due to how they perceive rewards and how that affects their consideration of

⁴⁷ See *Roper v. Simmons*, 543 U.S. 551, 569, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005); see also *J.D.B. v. North Carolina*, 564 U.S. 261, 272, 131 S.Ct. 2394, 180 L.Ed.2d 310 (2011).

⁴⁸ *Roper*, 543 U.S. at 569.

⁴⁹ *J.D.B.*, 564 U.S. at 272 (internal citations omitted) (plurality opinion).

⁵⁰ *Id.* at 273 (“The law has historically [assumed] children . . . lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them” (internal citations omitted)).

⁵¹ *Graham v. Florida*, 560 U.S. 48, 68, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010).

⁵² LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE 26 (2014); *Graham*, 560 U.S. at 68 (“[D]evelopments in psychology and brain science . . . show fundamental differences between juvenile and adult minds. For example, parts of the brain involved in behavior control continue to mature through late adolescence.”).

long-term consequences.⁵³ Youth generally also have less ability to control their impulses than adults and can have a heightened inclination for sensation-seeking behaviors.⁵⁴ This also may contribute to youth misperceiving threats where adults may not.⁵⁵ Youth also tend to have less future orientation than adults, which can lead to a preference of short-term gains over long-term consequences, particularly for younger adolescents.⁵⁶

Knowledge of these differences is essential for effective juvenile defense, especially in the context of the alleged offense, but also in the context of assisting youth in navigating the complexities of juvenile court proceedings. The developmental differences between youth and adults have clear implications for youth waiver of rights and plea decisions, requiring effective client counseling by attorneys who represent youth to ensure they are making well-informed decisions.

⁵³ See generally, Jason Chein et al., *Peers Increase Adolescent Risk Taking by Enhancing Activity in the Brain's Reward Circuitry*, 14 DEV. SCI. (2011); Lia O'Brien et al., *Adolescents Prefer More Immediate Rewards When in the Presence of their Peers*, 21 J. RES. ADOLESCENCE 747 (2011); Margo Gardner & Laurence Steinberg, *Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study*, 41 DEV. PSYCHOL. 625 (2005).

⁵⁴ See generally, Elizabeth P. Shulman & Elizabeth Cauffman, *Reward-Biased Risk Appraisal and Its Relation to Juvenile Versus Adult Crime*, 37 LAW & HUM. BEHAV. 412 (2013); Laurence Steinberg et al., *Age Differences in Sensation-Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764 (2008).

⁵⁵ Michael Dreyfuss et al., *Teens Impulsively React rather than Retreat from Threat*, 36 DEV. NEUROSCIENCE 220 (2014).

⁵⁶ Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009).

Similarly, outside of juvenile court context, the law typically accounts for differences between youth and adults. The common law applies a different standard of reasonableness for children.⁵⁷ And “almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.”⁵⁸ In general, “it is the odd legal rule that does *not* have some form of exception for children.”⁵⁹

C. Fundamental Fairness Requires the Examination of Due Process through a Youth-Focused Lens

The U.S. Supreme Court has held in no uncertain terms that the Due Process Clause of the Fourteenth Amendment requires youth be afforded the right to counsel.⁶⁰ That holding rested on the common-sense recognition that children are different than adults, and that, given those differences, it would be fundamentally unfair to subject a child to “the awesome prospect of incarceration” without allowing the “guiding hand of counsel” to protect their most basic rights.⁶¹

Because of “developments in psychology and brain science,” courts no longer must rely “only on common sense” when considering

⁵⁷ *J.D.B.*, 564 U.S. at 273.

⁵⁸ *Roper*, 543 U.S. at 569.

⁵⁹ *Miller v. Alabama*, 567 U.S. 460, 481, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); *see also J.D.B.* at 274 (“Our history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults” (internal citations omitted)).

⁶⁰ *In re Gault*, 387 U.S. at 41 (1967).

⁶¹ *Id.* at 36-37 (internal citations omitted); *see also McKeiver v. Pennsylvania*, 403 U.S. 528, 543, 91 S.Ct. 1976, 29 L.Ed.2d 647 (1971) (plurality opinion) (“the applicable due process standard in juvenile proceedings ... is fundamental fairness”).

children’s unique place in our constitutional system.⁶² Courts now understand that there are tangible physical and cognitive differences between youth and adult minds, which not only include “parts of the brain involved in behavior control,” but also account for children’s relative “inability to assess [the] consequences” of their actions.⁶³

In light of these advancements in neurological science and our attendant deepened understanding of the adolescent brain, the U.S. Supreme Court has consistently applied to youth the Constitution’s guarantees with these distinctive developmental characteristics in mind.⁶⁴ Moreover, the threats to individual liberty that our nation’s juvenile justice systems pose have only increased since *Gault* was decided, given the increasingly punitive edge of juvenile courts that threatens the

⁶² *Miller*, 567 U.S. at 471 (quoting *Graham* at 68).

⁶³ *Id.* at 472 (quoting *Graham* at 68); see also Donna M. Bishop & Hillary B. Farber, *Joining the Legal Significance of Adolescent Developmental Capacities with the Legal Rights Provided by In Re Gault*, 60 RUTGERS L. REV. 125, 150 (2007) (“the capacity to ... envision alternative behavioral choices, identify the consequences associated with each, assess the likelihood of these consequences, and weigh the alternatives and their consequences” does not emerge until later in adolescence).

⁶⁴ *Roper*, 543 U.S. at 570 (2005) (concluding that the Eighth Amendment’s prohibition on cruel and unusual punishment bars the imposition of the death penalty on offenders who committed their crimes before the age of eighteen, the Supreme Court relied on psychological research demonstrating juveniles’ categorical “susceptibility ... to immature and irresponsible behavior”); *J.D.B.* 564 U.S. at 269-70 (holding that courts must consider a child’s age when deciding whether a child is “in custody” for purposes of *Miranda* and the Fifth Amendment, in part relying on studies that show youth’s increased susceptibility to external pressures).

rehabilitative goals of many of these systems.⁶⁵ Today, delinquency adjudications also regularly carry significant consequences that follow youth for their entire lives, including restrictions on housing, employment, education, suffrage, and more, and that all too often lead to cycles of poverty and homelessness.⁶⁶

Given these developments, it should come as no surprise that courts across the country have applied the principles at the heart of the Supreme Court’s Sixth Amendment right to counsel jurisprudence to our nation’s juvenile justice systems.⁶⁷ Because the right to counsel for youth is centered in a due process analysis, courts should require more from attorneys representing youth than they might from those representing adults, given the unequal footing youth face as a result of their developmental differences.

D. States’ Failure to Provide Effective Counsel for Youth Disproportionately Harms Young People of Color and Other Disadvantaged Communities

⁶⁵ See, e.g., Marsha Levick & Neha Desai, *Still Waiting: The Elusive Quest to Ensure Juveniles a Constitutional Right to Counsel at all Stages of the Juvenile Court Process*, 60 RUTGERS L. REV. 175, 181-182 (2007).

⁶⁶ See Robert E. Shepherd, Jr., *Collateral Consequences of Juvenile Proceedings: Part II*, 15 CRIM. JUST. 41 (2000); NATIONAL JUVENILE DEFENDER CENTER, *Collateral Consequences*, www.njdc.info/collateral-consequences (last visited Sept. 25, 2019).

⁶⁷ See, e.g., *Reed v. Duter*, 416 F.2d 744, 749 (7th Cir. 1969) (“*Gault* must be construed as incorporating in juvenile court procedures, which may lead to deprivation of liberty ... the constitutional safeguards of the Fifth and Sixth Amendments.”); see also *United States v. M.I.M.*, 932 F.2d 1016, 1018 (1st Cir. 1991) (relying on Sixth Amendment cases in concluding that “[i]f a juvenile has a right to counsel, and a right to appeal, she must also have the right to counsel on her first direct appeal”).

Access to effective counsel disproportionately affects communities that have been socially and politically disadvantaged.⁶⁸ First and foremost, youth of color are overrepresented throughout the juvenile justice system.⁶⁹ And unfortunately, data indicate this disparity is worsening, as exhibited by rates of commitment to juvenile facilities.⁷⁰ Although the overall rate of commitment fell between 2003 and 2013, the gap between white youth and youth of color widened by 15%.⁷¹ Other overrepresented groups include LGBTQ youth, low-income youth, and youth with mental health issues or disabilities.⁷²

Counsel that understands the unique aspects of effectively representing youth is all the more necessary for those young people who confront implicit biases in the justice system every day.⁷³ Such biases are

⁶⁸ See generally, Tamar R. Birckhead, *The Racialization of Juvenile Justice and the Role of the Defense Attorney*, 58 B. C. L. REV. 379 (2017).

⁶⁹ Joshua Rovner, THE SENTENCING PROJECT, DISPROPORTIONATE MINORITY CONTACT IN THE JUVENILE JUSTICE SYSTEM 1-2 (2014).

⁷⁰ Joshua Rovner, THE SENTENCING PROJECT, RACIAL DISPARITIES IN YOUTH COMMITMENTS AND ARRESTS (2016).

⁷¹ *Id.* at 1 (Showing that by 2013, African-American youth were more than four times as likely to be committed as white youth, with the disparity almost as great for American Indian youth. Hispanic youth were 61% more likely to be committed than white youth.).

⁷² CENTER FOR AMERICAN PROGRESS & MOVEMENT ADVANCEMENT PROJECT, UNJUST: HOW THE BROKEN JUVENILE AND CRIMINAL SYSTEMS FAIL LGBTQ YOUTH 1 (2016), <http://lgbtmap.org/file/lgbt-criminal-justice-youth.pdf> (showing that while 7-9% of youth nationwide identify as LGBTQ, they constitute 20% of youth in juvenile facilities, including 40% of girls—and of these LGBTQ youth in juvenile court, 85% are nonwhite); Birckhead, *supra* note 68, at 414 (Almost 60% of the families of children in juvenile court are on public assistance and/or have annual household incomes below twenty-thousand dollars); SUE BURRELL & LOREN WARBOYS, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, SPECIAL EDUCATION AND THE JUVENILE JUSTICE SYSTEM 1 (2000), <https://www.ncjrs.gov/pdffiles1/ojjdp/179359.pdf>.

⁷³ See Birckhead, *supra* note 68, at 412.

most pernicious where decision-makers have wide discretion,⁷⁴ so the “crucible of meaningful adversarial testing” is essential.⁷⁵ Well-trained counsel similarly have a special role for LGBTQ youth, who are likely to face complex social problems with which the average defense attorney is unfamiliar.⁷⁶ Children with mental health issues or learning challenges may struggle with basic aspects of a juvenile proceeding, such as remembering and communicating events.⁷⁷ Likewise, children with developmental and intellectual disabilities are highly dependent on counsel who can help them understand the legal process and are in desperate need of attorneys who understand how their disabilities affect decision-making at the time of an alleged offense, during the court process, and throughout any court-ordered services.⁷⁸

Most importantly, these identity markers accentuate the need for courts to uphold the protections afforded to youth by the Constitution. Action by courts is particularly appropriate where harms primarily fall on

⁷⁴ Jerry Kang et. al., *Implicit Bias in the Courtroom*, 59 UCLA L.R. 1124, 1142 (2012).

⁷⁵ *Cronic*, 466 U.S. at 656; see also Birkhead, *supra* note 68, at 412.

⁷⁶ Sarah E. Valentine, *Traditional Advocacy for Nontraditional Youth: Rethinking Best Interest for the Queer Child*, 2008 MICH. ST. L.R. 1053, 1073 (2008) (noting that “an attorney who fails to understand the extent of harassment a queer child faces at school will be ineffective in resolving school centered issues that are causing the queer child’s involvement in the legal system”).

⁷⁷ Kristin Henning, *Loyalty, Paternalism, and Rights: Client Counseling Theory and the Role of Child’s Counsel in Delinquency Cases*, 81 NOTRE DAME L.R. 245, 273-74 (2005).

⁷⁸ See generally, Michele LaVigne & Gregory J. Van Rybroek, *Breakdown in the Language Zone: The Prevalence of Language Impairments Among Juvenile and Adult Offenders and Why It Matters*, 15 U.C. Davis J. JUV. L. & POL’Y 37, 43-44 (2011).

those with limited access to the political process.⁷⁹ When states deny children effective counsel, they notably deny it overwhelmingly to children who come from communities that lack a strong political voice. While justice-involved adults have significantly circumscribed political influence, justice-involved youth have virtually no political influence. These youth are “disenfranchised and vulnerable.”⁸⁰ They are “rarely visible to the policymakers and legislators who make the decisions that affect their lives.”⁸¹ Courts should act where legislatures have failed.

CONCLUSION

The State of Washington’s failure to adequately address the juvenile public defense emergency in Grays Harbor County violates children’s due process rights, which merit special protection given the well-established vulnerability of youth.⁸² Moreover, the failure to provide for an effective juvenile defense system disproportionately harms groups

⁷⁹ See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4, 58 S.Ct. 778, 82 L.Ed.2d 1234 (1938).

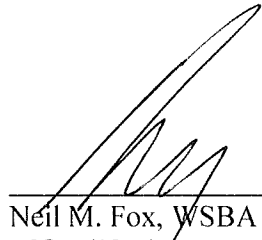
⁸⁰ NJDC Georgia Assessment, *supra* note 17, at 6.

⁸¹ *Id.*

⁸² Thomas Grisso et al., *Juveniles’ Competence to Stand Trial: A Comparison of Adolescents’ and Adults’ Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333 (2003) (noting the vulnerability of youth in legal contexts as study demonstrates that youth fifteen and younger are more likely than older adolescents to lack competence-related capacities, and that developmental immaturity may impact youth’s legal decision-making in other contexts such as confessing to the police or the decision to take a plea agreement); Laurence Steinberg et al., *Age Differences in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28 (2009) (indicating the vulnerability of youth through research on mechanism underlying developmental immaturity in adolescents, with results demonstrating that age is related to future orientation and with younger youth less likely to plan ahead and think about the future consequences of their actions).

that are socially and politically disadvantaged, including children of color, children who are LGBTQ, children from low-income backgrounds, children with mental illness, and children with disabilities. This case provides an opportunity for this Court to fulfill *Gault*'s mandate by granting Plaintiffs' requested relief.

DATED: September 27, 2019



Neil M. Fox, WSBA #15277
nf@neilfoxlaw.com
Law Office of Neil Fox, PLLC
2125 Western Ave. Suite 330
Seattle, WA 98121
Telephone: 206-728-5440
Cooperating Attorney for NJDC

National Juvenile Defender Center
Mary Ann Scali
1350 Connecticut Ave. NW, Suite
304
Washington, DC 20036
202-452-0010
mscali@njdc.info
Attorney for Amicus Curiae NJDC

Harris, Wiltshire & Grannis LLP
Roy L. Austin
1919 M Street NW, Ste. 800
Washington, DC 20036
202-730-1300
raustin@hwglaw.com
Attorney for Amicus Curiae NJDC

Declaration of Service

I, Neil Fox certify and declare as follows:

On September 27, 2019, I served a copy of the BRIEF OF
AMICUS CURIAE, THE NATIONAL JUVENILE DEFENDER
CENTER by filing it with the Appellate Portal which will send a copy to
all parties in this matter.

I certify or declare under penalty of perjury under the laws of the
State of Washington that the foregoing is true and correct.

DATED this 27th day of September 2019, at Seattle, WA.

s/ Neil M. Fox
WSBA No. 15277

LAW OFFICE OF NEIL FOX PLLC

September 27, 2019 - 8:44 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 96766-1
Appellate Court Case Title: Colleen Davison, et al. v. State of Washington, et al.
Superior Court Case Number: 17-2-01968-0

The following documents have been uploaded:

- 967661_Briefs_20190927084157SC795008_8351.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was Amicus Brief - Davison v WA.pdf
- 967661_Motion_20190927084157SC795008_7406.pdf
This File Contains:
Motion 1 - Amicus Curiae Brief
The Original File Name was Motion for Leave - Davison v WA.pdf

A copy of the uploaded files will be sent to:

- ComCEC@atg.wa.gov
- Jeff.Even@atg.wa.gov
- Lance.Pelletier@stokeslaw.com
- ali.hollenbeck@atg.wa.gov
- ank@stokeslaw.com
- arc@stokeslaw.com
- bschuster@aclu-wa.org
- echiang@aclu-wa.org
- ericm@atg.wa.gov
- jeffe@atg.wa.gov
- jhawk@aclu-wa.org
- jmidgley@aclu-wa.org
- mlh@stokeslaw.com
- mscali@njdc.info
- pleadings@aclu-wa.org
- raustin@hwglaw.com
- sgoolyef@atg.wa.gov
- talner@aclu-wa.org
- thw@stokeslaw.com
- yss@stokeslaw.com

Comments:

Sender Name: Neil Fox - Email: nf@neilfoxlaw.com
Address:
2125 WESTERN AVE STE 330
SEATTLE, WA, 98121-3573
Phone: 206-728-5440

Note: The Filing Id is 20190927084157SC795008